

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1280

To be argued by
MARTIN B. McNAMARA

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1280

UNITED STATES OF AMERICA,

Appellee,

—v.—

JUAN RAMON VASQUEZ,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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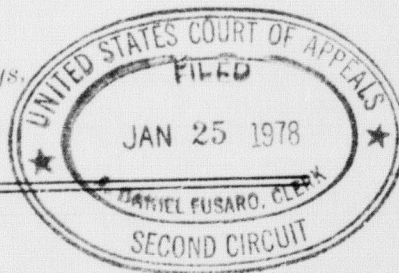


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Juan Ramon Vasquez, a/k/a "Ramon Ramos," appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 6, 1977 after a trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment S 77 Cr. 133,* filed on March 22, 1977, in Count One charged Juan Ramon Vasquez, John Narvaez, Luis Angel Reyes, Aurea Vasquez, a/k/a "Gloria Montalvo," Pedro Lugo, Enriqueta Colon, a/k/a "Catina," Gabriel Urbina-Astorga and Jose A. Agosto-Concepcion,

* Indictment S 77 Cr. 133 superseded Indictment 77 Cr. 133, which had been filed on February 18, 1977. The superseding indictment charged additional overt acts in Count One and changed the starting date of the conspiracy period from January 28, 1977 to October 1, 1976.

a/k/a "Indio,"* with conspiring, in violation of Title 21, United States Code, Sections 846, 812, 841(a)(1) and (b)(1)(A), from October 1, 1976 until the date of the filing of the indictment to violate the federal narcotics laws. Counts Two, Three, Four and Five charged Juan and Reyes with distributing, respectively, 34.44 grams of heroin on January 3, 1977, 173.10 grams of heroin on January 7, 1977, 48.77 grams of heroin on January 12, 1977 and 457.63 grams of heroin on January 26, 1977, all in violation of Title 21, United States Code, Sections 812, 841(a)(1) and (b)(1)(A), and Title 18, United States Code, Section 2.

Trial commenced on April 6, 1977 as to Colon, Narvaez and Juan,** continuing on April 7, 11, 12, 13, 14

* Juan Ramon Vasquez is hereinafter referred to as "Juan." Aurea Vasquez is hereinafter referred to as "Aurea."

** Reyes pleaded guilty to Counts Three, Four and Five. On April 26, 1977, he was sentenced to concurrent terms of six years of imprisonment plus six years of special parole on each count.

Aurea pleaded guilty to Count One and on May 5, 1977 was sentenced to a term of seven years of imprisonment plus six years of special parole.

Lugo pleaded guilty to Count One and on June 9, 1977 was sentenced to a term of six years of imprisonment plus six years of special parole.

Urbina-Astorga pleaded guilty in the Northern District of Illinois to Count One of the present indictment pursuant to Fed. R. Crim. P. 20 and also to a Northern District of Illinois indictment charging one count of possession of two and one-half kilograms of heroin on February 8, 1977 with intent to distribute it. On June 29, 1977, he was sentenced in the Northern District of Illinois to a term of eighteen months of imprisonment plus three years of special parole on the Northern District of Illinois indictment and was placed on parole on the Southern District of New York indictment for a period of five years to commence after the aforesaid special parole term with the special condition that the defendant depart the United States and not return as an illegal alien.

Agosto-Concepcion pleaded guilty to Count One and on May 4, 1977 was sentenced to a term of eight years of imprisonment plus four years of special parole.

and 18. On April 18, after deliberating for approximately one hour and forty minutes, with an interruption for a re-reading of the court's charge on conspiracy, the jury returned a partial verdict finding Juan guilty on Count One. On April 19, the jury returned verdicts finding Colon and Narvaez guilty on Count One and Juan guilty on Counts Two, Three, Four and Five.

On June 6, 1977, Judge Pierce sentenced Juan Ramon Vasquez to concurrent terms of ten years of imprisonment on each of Counts One, Two, Three, Four and Five plus three years of special parole. Colon was sentenced on June 2, 1977 to a term of three years of imprisonment plus three years of special parole. On June 1, 1977, Narvaez was sentenced to one year and one day of imprisonment plus three years of special parole.

Juan is in custody pending appeal. Colon has not appealed. Narvaez appealed and his conviction was affirmed without opinion by this Court (Feinberg and Meskill, C.J., and Bartels, D.J.) at the time of oral argument and by order dated December 14, 1977.*

* By order of this Court dated November 17, 1977, the brief submitted by Robert Belt, Esq., assigned counsel for Juan Ramon Vasquez, was stricken. Thereafter, present counsel was appointed to represent Juan on appeal. It should be noted, however, that Mr. Belt *was not* trial counsel for Juan. Juan's appointed trial counsel was Sidney Marks, Esq. Mr. Marks was relieved as Juan's counsel upon his own motion by order of this Court dated June 27, 1977, after a notice of appeal had been filed.

Statement of Facts

The Government's Case

1. The January Heroin Sales and Negotiations

On four separate occasions in January, 1977, Juan Ramon Vasquez and Luis Reyes sold heroin to undercover New York City Police Department Detective Stephen Caracappa. They sold one-half ounce on January 3 for \$750.00, four and one-half ounces on January 7 for \$6,300.00, one ounce on January 12 for \$1,500.00 and one full pound on January 26 for \$22,400.00. On each occasion, Reyes physically handed the heroin to Caracappa and received the money from the detective. Juan was present during three of the transfers. (Tr. 53-81, 371-95, 548-55, 574-75; GX 1, 2, 3, 4, 23).**

Caracappa's first contact with Juan came on December 23, 1976. A paid Government informant, at Caracappa's request and in the detective's presence, telephoned Juan. After the informant introduced Caracappa to Juan over the telephone, Juan said that he had heroin available to sell at a price of approximately \$1,500 an ounce. Juan asked Caracappa to come to Juan's apartment to discuss it further, and Caracappa agreed to do so. (Tr. 50, 228-30).

Subsequently, on January 3, 1977, Juan met with Caracappa in Caracappa's auto on 14th Street between Avenue C and Avenue D in Manhattan. At that meeting, Juan said that he didn't have a full ounce available at the time, but would sell a half-ounce to Caracappa for

** References preceded by "Tr." are to pages in the trial transcript; those preceded by "GX" are to Government exhibits at trial; those preceded by "Br." are to pages in appellant's brief.

\$750.00. Juan persuaded Caracappa to go to the River Bend East Club, 133 Avenue D, to make the purchase and meet the "connection," by assuring Caracappa that he, Juan, would guarantee Caracappa's safety. (Tr. 51-53, 221, 230-32, 235, 237-38, 270, 547-48). At the River Bend East Club, Juan introduced Caracappa to Reyes, and Caracappa bought the half-ounce of heroin, which Juan and Reyes told Caracappa he could return within twenty-four hours if he was dissatisfied with it. (Tr. 53-54, 57, 232-34, 371-72, 574-75).

On January 6, 1977, Caracappa again met with Juan and Reyes, this time at Feathers Restaurant. Caracappa said that the half-ounce he had purchased "wasn't that good," but he was interested in buying more. Juan said that they had just received 2 1/2 kilos from Chicago and there was heroin available. When Caracappa asked what they would feel comfortable selling to him, Juan and Reyes said they could do half-ounces every day for the next couple of days. They then agreed to sell four and one-half ounces of heroin to Caracappa for \$6,300.00 the next day at Feathers Restaurant. (Tr. 58-59, 238-41, 268-69, 271, 548-49).

Juan also asked where Caracappa was dealing the "stuff." When Caracappa said Philadelphia, Juan commented that he knew people in Philadelphia and maybe he and Caracappa could talk about doing something over there later on. (Tr. 59-60, 239-40).

On the next day, January 7, as agreed, Caracappa met Juan and Reyes at Feathers Restaurant and purchased the four and one-half ounces of heroin. After Caracappa had paid the \$6,300.00 to Reyes and received the heroin in the men's room, they both returned to Juan in the bar. Juan and Reyes both said they were getting the heroin from Chicago for about \$1,000.00 an ounce and that in the future they could talk about larger pur-

chases. Caracappa said he would be interested in buying the "material" at \$1,000.00 an ounce and would speak to them about going to Chicago the next time he saw Juan and Reyes. They said there would be no problem, that Caracappa could call either one of them at any time if he wanted more material. (Tr. 59-63, 241-44, 268-71, 368-69, 550, 570-71; GX 2, 23).

Caracappa next met with Juan and Reyes on January 11, 1977 at Juan's apartment, Apartment 13, 713 East 9th Street. Reyes showed Caracappa five one-ounce plastic bags of heroin, and Caracappa agreed that he would buy one ounce, which Reyes said was new and better quality heroin, the next day for \$1,500.00. Caracappa also said that he had spoken to some people about buying five ounces in Chicago and that he was willing to put up \$5,000 plus half of the expense money. When Reyes responded that the least Caracappa could buy in Chicago was twenty-four ounces at one time, the detective said he would have to check with his people about that. On January 12, Caracappa returned to Juan's apartment and purchased the ounce of "new material" as agreed upon. (Tr. 69-70, 251-54, 267-68, 552; GX 3, 23).

Two days later, Caracappa telephoned Juan and complained about the quality of the January 12 ounce. Juan told Caracappa not to worry about it, that Juan would make it up to Caracappa and that from then on Caracappa would deal directly with Juan's people. (Tr. 71).

On January 25, 1977, Caracappa met with Juan and Reyes at Juan's apartment. Juan said that they had plenty of "stuff" available and asked how much Caracappa wanted. Reyes suggested eight ounces, which Caracappa said would be fine. Juan, however, said, "How about eight more?" Caracappa then agreed to buy the

full pound for \$1400 an ounce. (Tr. 73, 254-56, 269-70, 552-53).*

On January 26, Caracappa telephoned Juan. Juan said everything was ready, and Caracappa then went to Juan's apartment and bought the pound of heroin for \$22,400. When Caracappa arrived at Juan's apartment Juan said that Reyes was going to get the "material." In a few minutes Reyes returned and handed to Caracappa a brown paper bag containing sixteen packets of heroin. Caracappa asked Juan to come downstairs, explaining that the money was in the car and that Caracappa had come with two of his people to protect the money. Juan said he understood, that there was no problem, that Caracappa could go down himself with the material and that Juan wasn't worried about Caracappa returning with the money. Caracappa went downstairs and gave the heroin to undercover detective John Bruno, who was waiting in a car. Caracappa then got the purchase money from Bruno, went back upstairs and paid for the heroin. Finally, before Caracappa left the apartment, Juan told Caracappa to call him about a larger purchase, and Caracappa said he would come back and speak to Juan in a few days. (Tr. 77-81, 225, 258-60, 278, 391-93, 555; GX 4, 23).

Accordingly, on January 28, Caracappa again went to Juan's apartment, bringing detective Bruno along and introducing him as Caracappa's cousin John. The detectives said they were fairly satisfied with the pound of heroin Caracappa had purchased and were looking for

* During this meeting at Juan's apartment, a man was let into Juan's apartment and introduced to Caracappa as "Manny." Juan then told his wife Neldy to get Manny the "stuff." Neldy went into the bedroom and brought a clear plastic packet of brown powder back to Juan, who took the packet and gave it to Manny. (Tr. 74, 256-57).

more material. Juan said that his brother-in-law Dino had just returned two or two and one-half kilos of heroin to Chicago because the material was bad, and that Juan was waiting for Dino to come back from Chicago. (Tr. 82-83, 277, 394-95, 440-41, 572).

Juan then showed the detectives approximately one ounce of heroin which Juan had in his bedroom. Juan asked Caracappa to examine the material. Caracappa did so and said it looked as if the material was "cut," to which Juan agreed. Juan then said that he believed they could get heroin in Chicago for \$800 an ounce, that, "We can handle any amount," and that he was going to get in touch with his brother-in-law Dino and make arrangements for a trip to Chicago to buy heroin. (Tr. 83-85, 277, 388, 397-98, 438-39).

Detectives Caracappa and Bruno met with Juan on January 31, 1977, again at Juan's apartment. Juan said that he was still waiting to hear from his brother-in-law Dino. The defendant Pedro Lugo then entered. After Juan introduced Lugo to the detectives as one of his "workers," Lugo handed \$1,300.00 to Juan, which Juan counted and put in his pocket. (Tr. 85, 279, 398-99, 439-41).

Juan asked Lugo what the price was in Chicago for a kilo of heroin. Lugo answered that in August the price had been \$28,000.00 per kilo. Bruno asked Lugo if they could do seven or eight kilos. Lugo replied that would be no problem, but that for the first time the detectives should do only three or four kilos to see what the quality was. He then said that he was going to find out from "the lady" the current price of a kilo in Chicago and would call them. (Tr. 86, 279, 282-83, 399-400, 441-43).

Lugo left the apartment then, but telephoned in 10 to 15 minutes. After speaking to Juan, Lugo told Cara-

cappa over the telephone that he was with "the lady," that she was going to make arrangements to go to Chicago to purchase three kilos at \$28,000.00 per kilo, and that they would meet with the detectives the next day to discuss it further. After the phone call, Juan told the detectives that they would meet the next day at Juan's house and go out to eat and talk about the heroin purchase. (Tr. 87, 280, 283, 400-01, 443).

2. The February 1 Meeting

On the next day, February 1, 1977, Caracappa met with the defendant Aurea Vasquez,* Pedro Lugo, Lugo's wife, Juan and Juan's wife Neldy Garcia at Juan's apartment. Aurea told Caracappa that she was the woman who was going to make arrangements to go to Chicago and that in Chicago they had white "material," or heroin, available as well as brown heroin. (Tr. 88, 284).

After detective Bruno, who was wearing a concealed Nagra tape recorder ** had joined the group, everyone went in two cars to Francesco's Restaurant on York Avenue in Manhattan for dinner. Bruno, Caracappa, Lugo and Juan traveled together in one car and the women traveled together in the second car. (Tr. 89, 401-03, 443-44). In conversation tape recorded in the car on the way to the restaurant, Juan told the detectives that he had been told that you could "cut" the white heroin available in Chicago two or three times. (GX

* Aurea Vasquez is the wife of the defendant John Narvaez. She is not related to Juan Ramon Vasquez.

** Initially, the Government offered the entire Nagra tape and a transcript of the tape (Tr. 95; GX 9 and 10). In response to defendants' objections and a suggestion by Judge Pierce, however, the Government reduced its offer to selected portions of the tape and transcript. (GX 10A, 10B, 10C, 10D).

10A). He also said that the price was set at twenty-eight. (Tr. 314-21; GX 10B, 10C). Lugo said the deal would be ready for February 3. (Tr. 316-19; GX 10B, 10C). Both Juan and Lugo promised that the detectives would hold the money until the heroin had been delivered and its quality tested, that the heroin would be delivered to them at a hotel, and that the transaction would be quick and business-like. (GX 10C).

Caracappa told Aurea to order five kilos of heroin in Chicago and that, if the white looked good, the detectives would buy one kilo of white and three kilos of brown heroin. Juan and Lugo also participated in the conversation and provided aliases for Caracappa to use on their airplane tickets to Chicago. (Tr. 90, 286-93, 404-09, 445-47; GX 7).

3. Delay

On the next day, however, February 2, 1977, in a telephone conversation, Juan told the detectives that there was a problem in Chicago because the heroin was no good and that the deal would have to be delayed. In subsequent conversations on the telephone the detectives received further confirmation and explanation of the delay from Narvaez and Aurea. (Tr. 102-115, 293-94, 327-28, 342, 411; GX 11, 12, 15, 16).

On February 3, 1977, with the delay continuing, Bruno telephoned Juan and recorded their conversation. (Tr. 416-18; GX 17, 18). Bruno complained that he had borrowed \$120,000 for the transaction and was in an "embarrassing" position. Juan said that there was still a delay in Chicago, that he was waiting to hear from Aurea, that he had told Aurea to tell Chicago to hold up on the transaction if the heroin wasn't any good and that the transaction still would take place. (GX 18).

On February 4, 1977, Bruno and Caracappa again met with Juan at his apartment with Bruno again wearing a concealed Nagra tape recorder.* Juan spoke on the telephone with Aurea and then told the detectives that they were going to Chicago the next day and that the "stuff" was ready. Aurea then came to Juan's apartment and the trip to Chicago was confirmed for the next day. (Tr. 137-42, 297-99, 421-25, 448-49, 575).

Later that evening in a recorded call to Juan and Aurea, the detectives again confirmed that they would all go to Chicago and the heroin transaction would take place for four kilograms on the next day. (Tr. 425; GX 21, 22).

4. The Trip to Chicago and Seizure of 2 1/2 Kilos

On February 5, 1977, on the plane on the way to Chicago Juan said he would take care of any trouble in Chicago and told Caracappa not to worry. (Tr. 149, 299, 342, 426, 576-77). At the airport in Chicago, the group was met by undercover agent Frank Tucci of the Chicago DEA office. Tucci was posing as the person Caracappa had sent ahead with the money from Philadelphia. From the airport, the entire party, including Tucci, went to the Essex Inn Hotel in Chicago. (Tr. 149, 426-27, 449, 456-59). At the hotel, Aurea contacted the heroin supplier, then said the "people" wanted to do the deal in another place. Tucci, at Caracappa's direction, showed the purchase money of \$110,000 in Government funds to Juan and Aurea. (Tr. 150-51, 300-301, 343-44, 428-29, 449-50, 459-61).

* The entire Nagra tape recording and a transcript thereof (GX 19, 20) were identified in court and made available to defense counsel. (Tr. 139-41). Portions of the tape and transcript (GX 20A, 20B, 20C, 20D, 20E and 20F) were offered and received into evidence.

Caracappa, Aurea and Tucci then picked up the defendant Enriqueta Colon* at her apartment at 3126-3128 West Cortland in Chicago** and went to a Chicago bar, Luis Pump Tavern to meet with the "connection." When Aurea told Caracappa, however, that "the people" did not have the heroin yet but wanted the purchase money in advance, he refused and the meeting was abandoned. (Tr. 156-58, 353-8, 430-31, 461-65, 496-97, 500-502, 586, 617-19). Back at the hotel, Juan suggested that he meet with the "connection" and that then there shouldn't be any problem. The detectives declined Juan's offer, saying they didn't want any trouble. (Tr. 303).

Aureau then telephoned "Indio," the defendant Jose A. Agosto-Concepcion, ("Agosto") who agreed on the phone with Caracappa to deliver five kilos of heroin to Caracappa the next day at Colon's house, with Caracappa to pay \$28,500 per kilo for four kilos and receive one kilo on consignment. Agosto said he would have to send out of town for the heroin and would be in touch with Aurea through Colon when the heroin had arrived. After Caracappa's conversation with Agosto, Juan asked if he might have one kilo from Caracappa on consignment, since Caracappa was getting an extra kilo. Juan said he would sell the kilo in New York and clean up. (Tr. 160-62, 303-04, 363, 431-33).

On the next morning, February 6, 1977, Caracappa and Aurea returned to Colon's apartment to await delivery of the heroin. The heroin didn't arrive, but Agosto assured Caracappa they could still do business if Caracappa

* Aurea said Colon was well trusted, that she was the first wife of a New York heroin dealer referred to as the "old man" and that deals had been done in her apartment before. (Tr. 154-55).

** Juan and detective Bruno remained at the hotel throughout their stay in Chicago. (Tr. 301-02, 430, 432-34, 450).

would wait a little longer. (Tr. 162-65, 364-66, 433-34, 472-73, 606-07, 619).

Caracappa ultimately told Agosto that he was going back to the hotel and would have to talk to some people about keeping the money in Chicago. After returning to the hotel and conferring with other agents, Caracappa had Aurea give a phone number to Colon at which Tucci could be reached. Caracappa, Bruno, Aurea and Juan then returned to New York. (Tr. 168-69, 307-08, 435-38, 451-53).

On February 8, 1977, Tucci met with Agosto and Colon at Colon's apartment and was given a heroin sample wrapped in aluminum foil. Agosto said that the price would be lowered to \$25,000 per kilo because the quality was not as good as promised. (Tr. 478-81, 511-17, 529-30, 532-36, 586-87, 608-09, 614-15, 620-21; GX 5, 23). Tucci left the apartment to test the heroin sample, then telephoned Agosto and agreed to the proposed deal. Agosto thereupon met with the defendant Gabriel Urbina-Astorga and another man, who drove in separate cars and by separate routes to the same house in Aurora, Illinois, outside of Chicago.* There, the defendant Urbina-Astorga picked up and placed in the trunk of his car a package which proved to contain 3138.0 grams of heroin. Urbina-Astorga then returned to Chicago, where agents seized the heroin pursuant to a search warrant. (Tr. 484-85, 517-20, 587-91, 610-611, 621-24; GX 6, 23). Thereafter, all of the defendants were arrested.

* Approximately fifteen minutes after leaving Urbina-Astorga, Agosto told Tucci that his people had gone to pick up the heroin.

From about 2:00 to 6:00 p.m., Tucci waited for the heroin at Colon's apartment with Agosto, Colon and a second undercover DEA agent, Kenneth Rhodes. Then the agents left saying they would call later. (Tr. 485-89, 520-23, 611-12, 615-16).

The Defense Case

The defendant Juan Ramon Vasquez testified. No other witnesses were called by any defendant.

Juan, on direct examination, claimed that Reyes had made the four January sales of heroin and that Juan had merely introduced Caracappa to Reyes, been a bystander at the four sales and received no money from the transactions. (Tr. 691-99, 701-08). Juan further testified that he had only introduced Caracappa to Reyes because a man named Fraticelli* had called him on or about December 18, said he had a man who would like to buy some dope, and, after Juan said, "Mr. Fraticelli, I am not selling dope," had told Juan to get somebody else. (Tr. 689-90).

As to the Chicago deal, Juan testified that he did not know any people in Chicago, that he had merely arranged to introduce Caracappa to Aurea Vasquez and had done that only because Caracappa repeatedly asked him if he knew anybody in Chicago. (Tr. 708-711). Juan said he had gone to Chicago only because Caracappa offered to pay him \$5,000 to come along and protect the money. (Tr. 705, 732).

As to the tapes and Juan's other incriminating statements to the detectives, Juan explained that he had exaggerated and lied in his conversations with the detectives because he felt the detectives were doing the same

* Juan testified that he was introduced to Fraticelli by a man named Titan in front of Juan's house in October, 1976. He said that in late October, he met Fraticelli at the cafeteria in the Americana Hotel where Fraticelli tried to involve him in a cocaine deal, which Juan refused. Juan said Fraticelli called Juan's home a few times in November, but that Juan was in Puerto Rico at the time. The first mention of Frank Flacko (Caracappa) to which Juan testified was the alleged December 18 phone call. (Tr. 687-90). He said Fraticelli was a "swindler," had done "time" for swindling and had been in Greenhaven prison. (Tr. 687, 738).

thing with him. (Tr. 701-02, 705, 708-09, 759-60). In conclusion, Juan testified that he had never dealt with, sold, delivered or possessed heroin. (Tr. 724).

On cross-examination, among other things, Juan admitted that neither Fraticelli nor Caracappa had ever threatened him and that Fraticelli had never given him any money. (Tr. 731-32).

ARGUMENT

Juan Ramon Vasquez Was Not Denied Effective Assistance Of Counsel At Trial.

Juan argues that the performance of his trial attorney constituted ineffective assistance of counsel. The established standard in this Circuit for determining effective assistance of counsel is the following:

"[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice . . ."

United States v. Bubar, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977), quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976), cert. denied, 46 U.S.L.W. 3215 (U.S., Oct. 4, 1977) and *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). See also, *United States v.*

Morales, Dkt. No. 77-1359, slip op. 377, 390 (2d Cir., Nov. 16, 1977); *LiPuma v. Commissioner*, Dkt. No. 77-2006, slip op. 4657, 4669-70 (2d Cir. July 11, 1977); *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977); *United States v. Medico*, 557 F.2d 309, 318-19 (2d Cir. 1977); *United States v. Taylor*, 562 F.2d 1345, 1360 (2d Cir. 1977); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir.), *cert. denied*, 429 U.S. 849 (1976); *United States ex rel. King v. Schubert*, 522 F.2d 527, 529 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). Not only was Juan not denied effective assistance under that prevailing standard, but the record demonstrates that trial counsel provided "the reasonably competent assistance of an attorney acting as [the defendant's] diligent conscientious advocate." *United States v. Tolliver*, Dkt. No. 77-1017, slip op. 863, 877 (2d Cir., Jan. 3, 1978). See also, *Rickenbacker v. Warden*, *supra*, 550 F.2d at 67 (Oakes, J., dissenting).

In assessing trial counsel's performance, it must first be said that he faced truly overwhelming proof at trial. That proof included the testimony of four different undercover agents and their back-up surveillance agents, tape recordings and transcripts of telling portions of the heroin negotiations, and six heroin exhibits. Juan himself stood in the center of that proof: he attended and brokered every meeting in New York with the Government agents, including all four heroin sales; he dealt with three of the four undercover agents who testified for the Government; and he made devastatingly incrim-

inating statements in recorded conversations with the Government agents.*

Nonetheless, trial counsel, far from being "inept" as claimed (Br. 8), in both cross-examination and Juan's

* The following is taken from the February 4, 1977 meeting at Juan's apartment concerning the impending Chicago transaction:

RAMON: I got a grocery store here OK and you put a grocery store in the front the people are going to buy from you grocery store unaudible its your money you buy what ever you want to buy.

DET. B: But this is a different business, its not a grocery store.

RAMON: No its the same always figure when you can make a profit if you going to make no profit then don't invest the money unaudible.

DET. B. Mm.

RAMON: This is business and your looking for quality.

DET. B: Of course thats what its all about.

RAMON: Thats what I tell him the things no good I don't want to invest my money because I don't want to loose money.

(GX 20G, pp. G47-48).

On the previous day, February 3, in conversation with Bruno concerning the delay in Chicago, Juan had said the following:

RAMON: Thank you John, but when she told me the thing over there was not too good, I didn't want to bother.

DET. B: Yea.

RAMON: You understand that's why I told here.

DET. B: Listen I understand I appreciate that you're looking out for my benefit.

RAMON: Because let me explain to you something, John when I do something with anybody, I like to have satisfaction with what he gets.

DET: B: Yea.

RAMON: Because I expect him to come back.

DET: B: Of course this is the whole point of the whole business over here. I want something regular, I want something steady. You tell me you're in business five years from the same people, I'm very happy with that.

RAMON: You understand.

(GX 18, pp. F5-F6).

direct examination emphasized the major facts favorable to the defendant, such as they were. These included the fact that the Government had through its informant and Caracappa first contacted Juan about heroin, not the other way around (Tr. 221, 224, 228-29, 689-90), that Juan had not physically handed the heroin to Caracappa or taken the money from the detective on the occasion of any of the four January heroin sales (Tr. 266, 270-71, 377-78), and that Juan had remained at the hotel with Bruno in Chicago, and had not accompanied Aurea and Caracappa to their meetings with Colon and Agosto. (Tr. 301-02, 450).

Before this Court, however, trial counsel is criticized for not calling the Government informant * as a witness. (Br. 14).** In his cross-examination of Caracappa, counsel had already laid his basis for raising an entrapment defense by showing that the Government's first contact and conversation with Juan concerning heroin had been initiated by the Government through its informant and Caracappa in the December 23, 1976 telephone call. (Tr. 221, 224, 228-29). Indeed, Judge Pierce charged the jury on entrapment, and trial counsel was permitted

* All four January heroin sales were made directly to and negotiated directly with Caracappa by Juan and Reyes. The informant made the December 23 and January 3 introductions of Caracappa to Juan; he waited in a car for Caracappa outside Juan's apartment building on February 25 and outside Feathers Restaurant on January 6; and he waited in the restaurant with Juan on January 7 while Reyes delivered heroin to Caracappa in the men's room at Feathers. (Tr. 230-42, 254-56).

** The Government does not concede that, as Juan claims (Br. 14), it was obligated to have "produced" the informant if requested to do so. See, e.g., *United States v. Turbide*, 558 F.2d 1053 (2d Cir. 1977). That question is not truly in point, however, since Juan argues that the informant was known to him (Br. 14), and there is nothing to show that the informant was unavailable as a witness.

to argue the defense vigorously to the jury in summation. (Tr. 836-41, 844-46, 856, 965-68).

Although appellate counsel assumes that the informant would have been helpful to Juan's case, trial counsel was certainly justified in making a tactical judgment that the informant's testimony would not have furthered the defense. Nothing in the case suggested that the informant, if called, would endorse Juan's far-fetched claim that he sold many substantial packages of heroin as a result of entrapment. Trial counsel also might have concluded that allowing the jury to make a live comparison between Juan and the informant, "a swindler" (Tr. 738), would not have been wise. Finally, trial counsel was aware from 3500 material turned over to him that the Government had immensely damaging evidence of Juan's criminal predisposition. Justified concern about opening the door to the admission of this evidence may have rightfully caused defense counsel to be circumspect in developing his entrapment defense.

Next, trial counsel is attacked for failing to "protest the frivolous claim of [Fifth Amendment] privilege" asserted by Reyes and Lugo. In fact, of course, trial counsel did challenge Reyes' and Lugo's Fifth Amendment rights, giving up only after Lugo had been called

to the stand outside the presence of the jury, asserted the Fifth Amendment, and that assertion had been sustained by Judge Pierce. (Tr. 676-79). Lugo and Reyes were both defendants who had pleaded guilty but not been sentenced at the time of trial in this case. Reyes still faced two counts in this case, including the conspiracy count, to which he had not pleaded guilty. Lugo faced pending charges in State court. In such circumstances, their claims of privilege were clearly substantial, and Lugo's claim was properly sustained by Judge Pierce. *United States v. Domenech*, 476 F.2d 1229, 1231 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973); *see also*, *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951); *Klein v. Smith*, 559 F.2d 189, 200 (2d Cir. 1977); *United States v. Housand*, 550 F.2d 818, 823 (2d Cir. 1977).

Finally, it is urged that trial counsel failed Juan in not requesting a charge on the "agency of the buyer theory." (Br. 17). Such a request, however, would have been properly rejected by the trial court if it had been submitted. The "procuring agent" defense applied only to prosecutions under the former 21 U.S.C. § 174 which prohibited the "sale" of narcotics and which was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Under the present statute, which prohibits "distribution" of narcotics, there is no "procuring agent" defense. *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977); *United States v. Masullo*, 489 F.2d 217, 220-21 (2d Cir. 1973).

In sum, the record shows that trial counsel, facing compelling proof of guilt, provided Juan with vigorous, competent, and dedicated representation. Indeed, certain matters in connection with which trial counsel is criticized before this Court, such as counsel's Fourth Amendment objection to the tapes (Br. 6; Tr. 96, 116-25) and counsel's efforts to obtain an interview or state-

ment from Reyes without notifying Reyes' attorney or giving Reyes a chance to consult with his attorney (Br. 15; Tr. 674-75), demonstrate that if trial counsel were to be faulted, it would be for his excessive zeal, rather than for inadequate representation.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARTIN B. McNAMARA being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

That on the *25TH* day of *JANUARY, 1978*
he served a copy of the within *BRIEF*
by placing the same in a properly postpaid franked envelope addressed:

FREDERICK H. BLOCK, Esq.
919 THIRD AVENUE
NEW YORK, N.Y. 10022

And deponent further says that he sealed the said envelope
and placed the same in the mail chute drop for mailing at
One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Martin B. McNamara

Sworn to before me this

25TH day of *JANUARY, 1978*

Jeannette Ann Grayes

JEANNETTE ANN GRAYES
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

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